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IN THE

SUPREME COURT OF THE UNITED STATES

1948 TERM

BEN L. BEETS, PETITIONER,

v.

WALTER A. HUNTER, WARDEN, UNITED STATES PENITENTIARY, LEAVENWORTH, KANSAS, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

Petitioner, Ben L. Beets, respectfully prays for writ of certiorari and review of the judgment of the Court of Appeals, Tenth Circuit, denying the petitioner's motion to dismiss the appeal taken by the Government in the matter of Walter A. Hunter, Warden, United States Penitentiary, Leavenworth, Kansas, Appellant, vs. Ben L. Beets, Appellee, No. 3886 in said Court of Appeals.

OPINIONS BELOW.

The judgment of the District Court discharging this petitioner from the custody of the respondent warden was not reported. The judgment of the Court of Appeals denying the motion to dismiss the appeal was a formal order. Certified printed transcript of record on file in said Appeal No. 3886, and typewritten copies of the further record, which includes petitioner's motion to dismiss the appeal and the order denying said motion, are before this court.

JURISDICTION.

Judgment of the Court of Appeals denying the motion to dismiss the appeal was entered May 11, 1949. Jurisdiction of the Supreme Court is invoked under Judicial Code, Sections 1254 and 2101, Title 28.

SUMMARY OF MATTER INVOLVED.

Petitioner was an American Combat soldier with the Third Armored Division in Germany. He was court-martialed and sentenced to life imprisonment on a charge of rape. While imprisoned at the United States Penitentiary, Leavenworth, Kansas, petitioner filed habeas corpus proceedings which were heard January 21 and 22, 1948, by the Honorable Alfred P. Murrah, Judge of the United States Court of Appeals (Printed T. 86-140), and on the 22nd day of January, 1948, judgment was entered, discharging the petitioner from custody (Printed T. 138, 19-25). On January 29 and 30, 1948, the Government filed motions for new trial (Printed T. 25-27)

and on January 30, 1948, filed motion to vacate the judgment (Printed T. 28). Hearing on the motions was April 7, 1948, (Printed T. 146). Said motions for new trial and to vacate judgment were overruled December 30, 1948 (T. 85). Notice of appeal by the Government was served and filed February 24, 1949, (Printed T. 86). This petitioner's motion to dismiss the appeal for lack of jurisdiction was filed April 9, 1949, (Typewritten T. 1) and was denied May 11, 1949 (Typewritten T. 6). This petitioner's motion to dismiss the appeal (omitting the supporting brief) was in words as follows:

> "Now comes the appellee, Ben L. Beets, and respectfully suggests that there exists a want of jurisdiction of this Honorable Court to hear and determine the appeal, and moves the dismissal of the appeal for want of jurisdiction.
>
> "Appellee states as follows:
>
> "1. That said cause was fully heard and determined on January 21 and 22, 1948, and judgment entered discharging appellee from imprisonment. (The judgment, findings, and conclusions, Record Pages 21-27, [Printed T. 138, 19-25] are by reference made a part of this motion.)
>
> "2. January 29, 1948, respondent's motion for new trial filed. (Record Pages 28-30, [Printed T. 25] by reference made a part of this motion.)
>
> "3. January 30, 1948, respondent's second motion for new trial filed. (Record Pages 31-32 [Printed T. 27] by reference made a part of this motion.)
>
> "4. March 12, 1948, respondent's motion to vacate judgment filed. (Record Pages 33-41 [Printed T. 28] by reference made a part of this motion.)

"5. December 30, 1948, orders entered overruling the foregoing motions. (Record Page 93 [Printed T. 85] by reference made a part of this motion.)

"6. February 24, 1949, respondent's notice of appeal filed.

"Appellee respectfully suggests as a ground for this motion to dismiss for want of jurisdiction the fact that motions for new trial and to vacate judgment are not recognized in Federal Habeas Corpus procedure as prescribed by Federal Statutes, and such motions do not operate to extend the time for taking an appeal from a final judgment discharging a Habeas Corpus petitioner from imprisonment."

QUESTIONS PRESENTED.

Motions for new trial and to vacate judgment are not recognized by the Federal Statutes pertaining to habeas corpus. Habeas corpus is statutory, and where judgment is entered in favor of the petitioner, discharging him from custody, appeal time is not extended by motions for new trial or to vacate judgment.

REASONS FOR GRANTING WRIT.

(a) Construction of the habeas corpus statutes and relation thereto of the Federal Rules are questions of substance which should be determined by the Supreme Court for guidance and convenience of lower courts and litigants.

(b) Conflict of opinion exists.

Holiday v. Johnston, 313 U. S. 342, 353.
Albert v. Patterson (1st), 155 F. 2d 429.
Hunter v. Thomas (10), 173 F. 2d 810.
Federal Rule 81 (a) (2).

In *Holiday v. Johnston*, 313 U. S. 342, 85 L. Ed. 1392, the Supreme Court held that Federal Rule 53, which authorizes references to a special master, does not apply in Habeas Corpus. The Court said in part:

> "Rule 81 (a) (2) provides that appeals in habeas corpus cases are to be governed by the rules, but that the rules are not applicable 'otherwise than on appeal' in habeas corpus cases 'except to the extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice in actions at law or suits in equity.' *** Since the practice in habeas corpus is set forth in plain terms in the Revised Statutes to which reference has been made Rule 53 has no application.
>
> "In summary, we hold that the provisions of the habeas corpus act, as embodied in the Revised Statutes, are too plain to be disregarded for any of the reasons advanced." (P. 353)

In *Albert v. Patterson* (1), 155 F. 2d 429, it was held that Federal Rule 52 (a) which requires findings of fact and conclusions of law on a trial before a District Court, does not apply to Habeas Corpus. There the Court said:

> "Nowhere in Chapter 14 of Title 28 of the United States Code Annotated is there any provision requiring findings of fact in habeas corpus proceedings.
>
> * * * * *
>
> And as already appears the Federal Rules of Civil Procedure apply to habeas corpus proceedings only on appeal, so that the part of Rule 52 (a) supra, requiring a trial court to make findings of fact and conclusions of law is inapplicable. *** (P. 433)"

In *Hunter v. Thomas,* (10th), 173 F. 2d 810, it was held that Civil Rule 59 does apply to habeas corpus, and the ruling is in conflict with the above decisions.

Furthermore, the decision (Hunter v. Thomas) is no proper guide to a correct ruling on the motion to dismiss this petitioner's case because the trial court denied the motions in petitioner's case. Where petitioner is discharged from custody, even right of appeal does not exist unless specifically given by statute. 25 Am. Jur., Habeas Corpus, Sec. 164. New trial is unknown to the history and law of habeas corpus.

Rule 81 of the Federal Rules of Civil Procedure, provides that:

> "In the following proceedings appeals are governed by these rules, but they are not applicable otherwise than on appeal except to the extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice in actions at law or suits in equity; admission to citizenship, habeas corpus, quo warranto, and forfeiture of property for violation of a statute of the United States. The requirements of U. S. C., Title 28, Paragraph 466, relating to certification of probable cause in certain appeals in habeas corpus cases remain in force."

Habeas corpus procedure is set forth in the Statutes of the United States, and Federal Rules 59 and 60 are not applicable to Habeas Corpus proceedings.

The Federal Statutes are extensive on the subject of Habeas Corpus. The statutory procedure is found in Title 28, (Sections 451 to 466 of the Old Code), Sections 2241 to 2255 inclusive, of the New Judicial Code.

The fact that this New Judicial Code, effective September 1, 1948, reenacts the Habeas Corpus procedure contained in the Old Code effective at a date approximately one year after the effective date of the amendments to the Federal Rules of Civil Procedure is indication of the intention of Congress that Habeas Corpus continue to be governed by the Federal Statutes upon the subject.

In Section 2243 of the New Judicial Code the Congressional admonition is retained and reiterated that,

> "The Court shall summarily hear and determine the facts, and dispose of the matter as law and justice require."

But in Section 2254 of the New Code, provision is made for an appeal from such final order disposing of the case. There is no recognition in either the old or the new Judicial Code of motions for a new trial, and such motions have no place in Habeas Corpus procedure.

CONCLUSION.

Petitioner respectfully prays that the Honorable Court cause the writ to issue.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 241

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WALTER A. HUNTER, WARDEN, UNITED STATES PENITENTIARY, LEAVENWORTH, KANSAS

ON PETITION OF A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

In June 1945, petitioner was found guilty of rape after trial before a court martial convened at Darmstadt, Germany, and he was sentenced to life imprisonment. His sentence was later reduced, first to 30 and then to 18 years' imprisonment, by orders of the Secretary of War (R. 11–12). The present proceeding arose upon a petition for a writ of habeas corpus filed by petitioner in the District Court for the District of Kansas challenging the validity of his conviction (R. 5–10). A hearing was held on January 21 and 22, 1948, at which petitioner testified and adduced the testimony of three other witnesses,

and respondent introduced the record of the court-martial proceedings (R. 86–140). At the conclusion of the hearing the District Court announced its decision (R. 138–140) and entered a decree, dated January 22, 1948, adjudging that petitioner was unlawfully held by respondent and directing that he be forthwith discharged from custody (R. 19). Petitioner was released upon his personal recognizance without surety pending appeal (R. 19–20).

On January 29 and 30, 1948, respondent filed a motion and supplemental motion for a new trial (R. 25–28) and on March 12, 1948, a motion to vacate the decree of January 22 and to permit respondent to adduce additional testimony of persons whose affidavits were attached to the motion (R. 28–74). The latter motion alleged surprise in an amendment of the habeas corpus petition which the court allowed at the opening of the hearing on January 21 (R. 18–19, 87) and in the testimony of the witnesses called on petitioner's behalf, and stated that since the hearing other witnesses had been located who could give pertinent testimony negating the evidence underlying the court's findings and conclusions, entered January 29 (R. 20–25), that petitioner did not have the effective assistance of counsel at his court-martial trial and that the court martial was influenced by higher authority and consequently was not free to render impartial justice (R. 28–38). A hearing on these motions was held on

April 7, 1948 (R. 146–197), upon the understanding that if the court found the additional testimony adduced by respondent sufficient to refute petitioner's contentions it would vacate the decree of January 22 and enter judgment against him on the whole record (R. 147–150, 191–196). The court stated at the conclusion of the hearing, after the government had adduced all evidence available for a new trial (R. 195): "And so, the case is, in effect, retried. * * * what we are doing here is retrying this case" (R. 196). The court explained that it had adopted this course, rather than formally setting aside the decree of January 22 and granting a new trial, in order to obviate remanding petitioner to respondent's custody pending ultimate decision (*ibid.;* see also R. 148). The cause was then continued to afford petitioner an opportunity to bring in additional witnesses (R. 196–197). Thereafter, on June 2, 1948, petitioner filed an "Opposition to Further Proceedings in Said Cause," taking the position that respondent's motions to vacate the judgment and for a new trial would not lie and that the time for appeal had therefore expired (R. 84). On December 30, 1948, without any further proceedings, the court overruled respondent's motions (R. 85).

On February 24, 1949, within 60 days from the denial of these motions (see 28 U. S. C. (1948 rev.) 2107), respondent filed a notice of appeal from the judgment of January 22, 1948, and the

further order of December 30, 1948 (R. 86). Petitioner thereafter moved in the Court of Appeals to dismiss the appeals for lack of jurisdiction (R. 201–205). The motion was denied on May 11, 1949 (R. 206), and it is this action of the Court of Appeals which petitioner asks this Court to review.

The order denying petitioner's motion to dismiss the appeal was only an interlocutory ruling and not a final judgment, since it did not dispose of the whole case on its merits, *Bostwick* v. *Brinkerhoff*, 106 U. S. 3, 4, and the appeal is still pending in the Court of Appeals. It is true that this Court has power to grant certiorari to review interlocutory as well as final decrees of a court of appeals. *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U. S. 399, 418. However, this power is exercised only in "extraordinary cases," and the fact that the decree sought to be reviewed is not final may, of itself, furnish sufficient ground for denial of the application. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U. S. 251, 258. Certiorari should not issue to review an interlocutory decree of a court of appeals "unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *American Construction Co.* v. *Jacksonville Railway Co.*, 148 U. S. 372, 384.[1] Clearly,

[1] Robertson and Kirkham, in their work, *Jurisdiction of the Supreme Court of the United States*, express doubt as to the power of this Court to issue certiorari to review "mere

there are here no extraordinary circumstances or matters of urgent public interest such as to justify an exception to the general rule. If the Court of Appeals should reverse the judgment of the District Court, petitioner will then have ample opportunity to seek review here of the order of which he now complains, as well as the merits of his case. In the meantime, he is free on his personal recognizance granted by the District Court immediately following its decree of January 22, 1948.

In any event, it is clear from the summary of the proceedings in the District Court set forth above that the final judgment of the court was embodied in the order of December 30, 1948, overruling respondent's motions to vacate the earlier judgment and for a new trial. The motion and supplemental motion for a new trial were filed within ten days from the entry of the decree of January 22, 1948 (see Rule 59, F. R. Civ. P.), and the motion of March 12, 1948, to vacate that decree was filed within the same term of court and within the period which would otherwise have been allowed

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rulings by the Circuit Courts of Appeals upon motions presented in appeals pending before them, not going to the merits of such appeals," but they argue that "The conceded power of the Supreme Court under that section [240 (a) of the Judicial Code, now 28 U. S. C. 1254 (1)] to review interlocutory decrees and non-final judgments is to be exercised, it is submitted, only in the review of such judgments, decrees or orders as dispose, for the moment, of the whole controversy before the court." § 119, pp. 208–210.

for appeal.[2] The court entertained all these motions, held a hearing on April 7, 1948, which was in effect a continuation of the hearing held on January 21 and 22, and rendered its ultimate decision (see R. 192), based upon the evidence adduced at both hearings, on December 30, 1948, in the form of the order overruling respondent's motions. At the hearing on April 7, the court refrained from vacating the decree of January 22, which it recognized would have been an appropriate step as a preliminary to the reopening of the hearings (R. 148), and as it had the power to do (*Hunter* v. *Thomas,* 173 F. 2d 810, 812 (C. A. 10)), merely as an accommodation to petitioner so that he might continue to enjoy the freedom granted him on his personal recognizance by the decree of January 22. In these circumstances, an appeal prior to the final disposition of respondent's motions would have been premature (cf. *Fleming* v. *Borders,* 165 F. 2d 101 (C. A. 9)), since the decree had not taken final effect for the purposes of appeal (cf. *Aspen Mining and Smelting Co.* v. *Billings,* 150 U. S. 31, 36).

[2] Whether the period was at that time three months (28 U. S. C. (1946 ed.) 230) or 60 days (Rule 73, F. R. Civ. P., as amended December 27, 1946, but not effective until March 1948, 329 U. S. 866–867, 875).

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1949.

U. S. GOVERNMENT PRINTING OFFICE: 1949